91-1304

No. _____

Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1991

WILLIAM LAMORTE,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

Petition For A Writ Of Certiorari To The Untied States Court Of Appeals For The Second Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Where a prosecutor tells the jury in rebuttal argument that the Government is too busy to prosecute innocent people, and the court overrules the defendant's objection, is this reversible error *per se* because that kind of improper remark refers to matters not adduced at trial and is inherently prejudicial, as the Third Circuit has held, or does it require an additional showing of "substantial prejudice," as the Second Circuit held here?

2. Where a prosecutor's improper remark subverts the jury's function in assessing the credibility of Government witnesses, should a reviewing court nevertheless credit those witnesses when determining whether the remark was harmless error?

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PETITION FOR A WRIT OF CERTIORARI

Petitioner prays for a writ of certiorari to review the judgment of the United States Court of Appeals for the Second Circuit in this case.

OPINION BELOW

The opinion of the court of appeals is reported at 950 F.2d 80 and is reprinted in the appendix at App. 1. The district court did not render an opinion.

JURISDICTION

The judgment of the court of appeals was entered on November 15, 1991. This petition for a writ of certiorari is filed within ninety days of that judgment in compliance with Rule 13. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISION AND RULE INVOLVED

United States Constitution, Amendment VI, provides in pertinent part:

> In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him. . . .

Rule 52(a) of the Federal Rules of Criminal Procedure provides:

> Harmless error. Any error, defect, irregularity or variance which does not affect substantial rights shall be disregarded.

STATEMENT OF THE CASE

1. Petitioner was tried before a jury in the Southern District of New York on an indictment charging him with one count of conspiring to import marijuana, 21 U.S.C. §§ 846 and 963, and one count of engaging in a continuing criminal enterprise, 21 U.S.C. § 848. The theory of the prosecution was that from 1970 to 1985 Petitioner conspired with various persons to import marijuana and

hashish from such places as Jamaica, Colombia, Morocco, Lebanon and Thailand and to distribute these controlled substances in the United States. To sustain its theory, the prosecution relied largely on the bargained for testimony of several alleged coconspirators and on the testimony of an informant housed with Petitioner in a detention facility.

The theory of the defense, as vigorously asserted in defense counsel's summation, was that these witnesses were not credible: that they had cast blame on Petitioner in order to obtain immunity or other lenient treatment for themselves and that their testimony was not corroborated by independent evidence such as tape recordings, surveillance photos or undercover agents. The defense further asserted that to the extent Petitioner was ever involved in any drug conspiracy, he withdrew from it prior to the date that would bring such an offense within the statute of limitations.

In rebuttal summation, responding to the defense contention that the Government's witnesses had falsely incriminated the defendant in order to escape punishment for their own crimes, the prosecutor pointed to evidence in support of the witnesses' credibility, then told the jury:

> Basically that right there just explains to you how ridiculous the defense contention is that this whole thing was just a sinister plot orchestrated by the government and the witness to frame the defendant. *I think I can probably leave it at that.*
>
> But there is one – there are actually a couple of other points, *perhaps I shouldn't leave it at that.*

> Ask yourselves, why would these witnesses and why would the Government seek to frame the defendant? *You don't think the government is busy enough prosecuting crimes? You don't think the government is busy enough prosecuting crimes that it has the time to be prosecuting innocent people,* going after people arbitrarily? I think I'll go after that guy today? (Emphasis added)

Defense counsel's immediate objection to the offending remark was overruled when the court told the prosecutor, "You may continue."

On the sixth day of actual deliberations, a Friday, the jury sent out a note stating: "We the jurors have read and reviewed the instructions and evidence and have not been able to come to an agreement among ourselves. No one wants to change their answers. Therefore, we are completely deadlocked." The jury was sent home for the weekend. On Monday, the seventh day of deliberations, the jury sent out another note stating: "We the jurors can agree on everything except one question, which is making it very difficult for all of us. We are at a complete standstill." The jury was given an "*Allen* charge" and finally delivered a guilty verdict on both counts later that day.

Petitioner was sentenced to 50 years' imprisonment without parole, fined $49,200,000 and ordered to forfeit over $25,000,000 in property.

2. On Petitioner's appeal from the judgment of conviction, the court of appeals held that the prosecutor's remark was improper, but that reversal was unwarranted because it did not cause "substantial prejudice" to the defendant denying him his right to a fair trial. (App. 6-8)

In arriving at this conclusion, the court characterized the prosecutor's misconduct as *de minimis* – "best understood as ridiculing the notion that the government had arbitrarily constructed a massive case against [Petitioner] out of thin air" – and stated that the evidence of pre-statute of limitations criminality was "overwhelming," even though the statute of limitations question was itself a close one and conviction was not certain. (App. 7-8) Consequently, according to the court of appeals, "there was virtually no likelihood that absent the questioned statement the jury would have accepted LaMorte's 'fabrication' defense." (App. 8)

REASONS FOR GRANTING THE PETITION

1. An argument to the jury that the Government is too busy to prosecute innocent people is by its nature not susceptible to refutation by a defendant. It refers to matters outside the evidence and indicates that the Government, as a matter of policy or practice, does not prosecute innocent people. It suggests that the Government, because of its heavy workload in fighting crime, only has time to prosecute those cases where guilt is most clear and, inferentially, that the Government has determined the defendant's guilt based on additional information known to the Government.

For these reasons, in *United States v. DiLoreto*, 888 F.2d 996 (3d Cir. 1989), where the credibility of the prosecution witnesses was the dispositive trial issue and the prosecutor remarked in rebuttal summation that "We don't put liars on the stand," the Third Circuit pointed

out that such arguments, unlike improper arguments based on the evidence, jeopardize a defendant's right to be tried solely on the basis of evidence adduced at trial. *Id.* at 999. Consequently, the Third Circuit held that while a prosecutor's expression of personal opinion based on the evidence cannot serve as grounds for reversal unless the defendant was prejudiced thereby, "remarks regarding the defendant's guilt or a witness' credibility, if based on information not adduced at trial, require reversal *per se*." *Id.; see also United States v. Somers*, 496 F.2d 723, 740 (3d Cir. 1974) (prosecutor's improper comment should be evaluated on case-by-case basis except where "inherently prejudicial").

Here, on the other hand, even though as in *DiLoreto* the credibility of the prosecution witnesses was the dispositive trial issue, the court of appeals required an independent showing of "substantial prejudice" to Petitioner from the prosecutor's improper remark and concluded that there was none, characterizing the misconduct as *de minimis* and pointing to the "overwhelming evidence" of criminality, at least pre-statute of limitations criminality. The court of appeals' approach is misconceived because, especially where the trial turns on the credibility of prosecution witnesses, substantial prejudice *inheres* in a statement that the Government is too busy to prosecute innocent people and, based as it is on matters outside the record, no weighing of record evidence can appropriately be employed to offset such a remark.

2. At the outset, the circumstances of this case must be contrasted with those in *United States v. Young*, 470 U.S. 1 (1985), cited by the court of appeals. In *Young* the prosecutor in rebuttal argument expressed his personal

opinion that the defendant was guilty and exhorted the jury to "do its job," but defense counsel made no objection. This Court held that the prosecutor's response – although error – was not "plain error" warranting the court to overlook the absence of any objection by the defense. *Id.* at 14. The Court noted that the prosecutor's expression of his personal opinion was based on the record evidence, *id.* at 19, and that proof of guilt was overwhelming in light of "the substantial and virtually uncontradicted evidence of respondent's willful violation," *id.* at 20.

The *Young* Court also observed that a relevant consideration in assessing any unfairly prejudicial impact of a prosecutor's improper remarks is whether they were invited by defense counsel's own argument and did no more than respond substantially in order to "right the scale." *Id.* at 12-13. The prosecutor's comments in *Young*, however, "went beyond what was necessary to 'right the scale' in the wake of defense counsel's misconduct." *Id.* at 14. Nevertheless, those comments did not rise to the level of "plain error," because "[v]iewed in context, the prosecutor's statements, although inappropriate and amounting to error, were not such as to undermine the fundamental fairness of the trial and contribute to a miscarriage of justice." *Id.* at 16.

In *Young*, the Court made clear that the prosecutor's remarks were expressions of *personal* opinion. *Id.* at 17. The prosecutor had repeatedly spoken in the first person, stating, for example, that "I think" the defendant intended to defraud and "I don't believe it." *Id.* at 5-6. On the other hand, a prosecutor's statement that *the Government* is too busy to prosecute innocent people is much

more than an expression of personal opinion; it's a statement expressive of institutional policy and practice. Thus, unlike the particular remarks at issue in *Young*, it poses the two dangers about which *Young* warned: "such comments can convey the impression that evidence not presented to the jury, but known to the prosecutor, supports the charges against the defendant and can thus jeopardize the defendant's right to be tried solely on the basis of the evidence presented to the jury; and the prosecutor's opinion carries with it the imprimatur of the Government and may induce the jury to trust the Government's judgment rather than its own view of the evidence." *Id.* at 18-19.

Here of course, unlike in *Young*, defense counsel did object to the prosecutor's comment and therefore the question is not one of "plain error." This, however, is much more than a procedural consideration: it affects the substance of the error itself. Since defense counsel's immediate objection to the offending remark was *overruled*, the result was not only to leave with the jury the prosecutor's patently improper argument, but to lead the jury to conclude that the argument that the Government was too busy to prosecute innocent people was a valid one. *See Caldwell v. Mississippi*, 472 U.S. 320, 339 (1985). Thus, the court's overruling the objection exacerbated the inherently prejudicial impact of the improper statement.

Finally, viewing defense counsel's own argument to the jury as improperly intimating that the Government had concocted the entire case against Petitioner, nevertheless here, as in *Young*, the prosecutor's comment that the Government is too busy to prosecute innocent people "went beyond what was necessary to 'right the scale' in the wake of defense counsel's misconduct." 470 U.S. at

14. In the several transcript pages preceding and following the offending remark the prosecutor *did* respond to the defense summation with specific arguments, based on the trial evidence, as to why the prosecution witnesses were credible and did not falsely implicate the defendant in order to benefit themselves. Consequently, since the Government did offer many arguments properly rebutting the defense contention, there was absolutely no justification for the offending comment. In other words, the comment about the Government not prosecuting innocent people was not necessary to "right the scale," because defense counsel's argument was properly rebutted otherwise.

3. The court of appeals did not employ the term "harmless error" in its analysis, but rather inquired whether the prosecutor's misconduct "caused substantial prejudice to the defendant, thereby depriving him of his right to a fair trial." (App. 6) This, however, may well be just another formulation of harmless error analysis.[1] In any event, it is not Petitioner's position that reversal is required even if he was not prejudiced or harmed by the prosecutor's remark and the court's overruling of his objection. *See generally Arizona v. Fulminante*, 111 S.Ct.

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[1] On the other hand, the "substantial prejudice" formulation may impose a higher standard for reversible error than would harmless error analysis. *See United States v. Hasting*, 461 U.S. 499, 510-11 (1983) (prosecutor's improper comment on defendant's failure to testify harmless if it is clear beyond a reasonable doubt that, absent the comment, the jury would have returned a verdict of guilty); *Chapman v. California*, 386 U.S. 18, 23 (1967) (error is harmless only if prosecution can demonstrate beyond a reasonable doubt that error did not contribute to the verdict).

1246, 1263-65 (1991) (harmless error doctrine applies to "trial errors"); *United States v. Young*, 470 U.S. at 13 n.10 (where defendant objects to prosecutor's improper remarks, harmless error standard applies). Rather, it is Petitioner's position that substantial prejudice sufficient to withstand harmless error scrutiny is established when a defendant shows: (1) that the prosecutor made a remark of this specific nature, i.e., one referring to matters outside the evidence and suggestive of Government policy; (2) that the court implicitly validated the remark by overruling Petitioner's objection; and (3) that the credibility of the prosecution witnesses was the central issue at trial.

While Third Circuit in *United States v. DiLoreto*, 888 F.2d 996, stated that such a circumstance "require[s] reversal *per se*," and places no "burden upon the defendant to demonstrate prejudice," *id.* at 99, 99 n. 2, Petitioner submits that a more accurate articulation of the principle is that a defendant simultaneously establishes sufficient prejudice to require reversal when he establishes the elements of that particular kind of error – a remark referring to matters outside the evidence, suggesting Government policy, implicitly validated by the trial judge, and tainting a dispositive question of credibility – and there is no burden on the defendant to demonstrate *further* prejudice. This is the rule Petitioner would ask this Court to adopt if certiorari were granted.

4. Any weighing of the assertedly "overwhelming evidence" of Petitioner's guilt, as the court of appeals engaged in here, is a flawed approach in cases like this, because a quantitative assessment of the overall proof of guilt becomes a circular pursuit, impeded by the inability to gauge the impact of the peculiar type of remark made

by the prosecutor on the jury's credibility determination. Where, as here, the evidence supporting conviction consists of the testimony of witnesses, as opposed to documentary, forensic or other incontrovertible evidence, and where the prosecutor has told the jury, over objection, that the Government is too busy to prosecute innocent people, the testimony of the prosecution's witnesses cannot simply be assumed to be true for purposes of weighing the strength of the Government's case. This is so because the prosecutor's remarks may very well have colored the jury's determination of the credibility of those witnesses. The court of appeals' conclusion that the evidence of criminality was overwhelming, however, takes as a given that the testimony of the prosecution witnesses was true.

Although, of course, on an appeal from a judgment of conviction, an appellate court must view the evidence in the light most favorable to the Government and resolve all questions of credibility in the Government's favor, *Glasser v. United States*, 315 U.S. 60, 80 (1942), that standard of review presupposes an untainted credibility determination by a properly advised jury. Obviously, a critical prosecution witness' testimony could not be assumed to be true, for purposes of harmless error analysis, where the error was that the court had misinstructed the jury on how to determine that witness' credibility. So too here, it is anomalous to conclude that the proof of guilt was overwhelming where the entire thrust of the defense was that the prosecution witnesses were not credible and where the prosecutor's remarks improperly suggested to the jury that the witnesses were credible

because the Government doesn't prosecute innocent people. Since the strength of the Government's case cannot properly be measured as if the witnesses' testimony was credited, a determination that the defendant was not prejudiced in light of overwhelming testimonial proof of guilt disregards the effect of the error on that proof and is necessarily invalid. Therefore, an independent showing of substantial prejudice, to be weighed against the overall proof of guilt, is not feasible in such a case.

5. Overlapping these shortcomings in the court of appeals' approach and contributing to its infirmity is the fact that the court, in stating that "there was virtually no likelihood that absent the questioned statement the jury would have accepted LaMorte's 'fabrication' defense," in effect substituted itself for the jury and drew two speculative and inappropriate conclusions: that Petitioner's "fabrication" defense itself was not viable and that the prosecutor's remark had no effect on the jurors.

It is not at all uncommon for juries to acquit defendants where, as here, the Government's case rests on the testimony of alleged coconspirators cooperating with the Government in return for lenient treatment. A defense attacking the credibility of such witnesses presents the quintessential jury question. The court of appeals' conclusion that there was virtually no likelihood the jury would have accepted Petitioner's defense is therefore a remarkable one, tantamount to suggesting as a matter of law that such a defense is not sustainable.

This is not to say that a court of appeals may not conclude in *any* case that a defense had no likelihood of success. Where evidence *in addition to* or *other than* the

testimony of witnesses with motive to fabricate constitutes the Government's case, a court of appeals could certainly draw that conclusion. *See, e.g., United States v. Hasting*, 461 U.S. at 511 (compelling case of guilt where rape victims promptly identified defendants in lineups, neutral witnesses corroborated victims' testimony, automobile in which victims were carried off was registered to defendant, property of victim was found in defendant's possession, and defendant's fingerprints were found in car in which victims had initially been riding). But whether a jury would likely believe or disbelieve cooperating witnesses is not a question an appellate court should properly decide.

Similarly, the court of appeals' conclusion that the prosecutor's remark had no likely impact on the jurors is impossible to justify on any reasoned basis. If language has force and jurors understanding, how can anyone conclude that the prosecutor's statement that the Government is too busy to prosecute innocent people was not seriously considered by at least some of the jurors? Again, only by circular reference to the assertedly "overwhelming evidence" of Petitioner's guilt could one hope to sustain such a conclusion, but the jury's assessment of the worth of that evidence is itself influenced by the remark whose impact is being scrutinized.

6. Although the court of appeals acknowledged that it could not conclude conviction was certain, because the "separate" question of Petitioner's withdrawal from the conspiracy outside the statute of limitations was a close one, the court incorrectly and seemingly arbitrarily concluded that the prosecutor's improper remarks were

addressed only to the question of pre-statute of limitations criminality, as to which the evidence was assertedly overwhelming, and that reversal was therefore not required. (App. 8) In similar vein, Petitioner's "fabrication" defense had virtually no chance of acceptance by the jury apparently because it, too, was addressed only to the question of pre-statute of limitations criminality, not to the question of withdrawal. (App. 8)

In summation, however, defense counsel argued explicitly, at length and in great detail that the cooperating witnesses had lied *specifically* about the dates of certain events in order to bring Petitioner's conduct within the statute of limitations. (Trial transcript at 2045-73) Indeed, counsel bluntly stated:

> So the government wants you to believe, ladies and gentlemen, that this guy [Petitioner] went up in a puff of smoke in December 1984 just in time to get snagged within the statute of limitations. That's what they want you to believe.
>
> What I say you should believe, ladies and gentlemen, is that they made this up. The witnesses came in here and they knew, they knew that it's part of their deal, they knew as part of what they had to do in connection with this case they had to put Bill LaMorte in something, in some conversation, in something inside the statute of limitations date, otherwise we are wasting our time. (Trial transcript at 2062)

In its rebuttal summation the Government specifically noted that "the defense wants [you] to believe the government put [the witnesses] up to it to place the defendant within the statute of limitations." (Trial transcript at

2152) In leading up to his improper remark, the prosecutor argued that the defense had suggested that the Government orchestrated its witnesses to tailor their testimony "to place the defendant in all the critical places at all the critical times." (Trial transcript at 2115) And following the improper remark, the prosecutor argued that if the Government had in fact orchestrated the witnesses to lie, it would have done a better job and left no opening at all for a defense that the defendant withdrew from the conspiracy outside the statute of limitations. (Trial transcript at 2119-20)

In view of the above, the court of appeals had no basis for concluding that the prosecutor's improper comment was addressed only to the pre-statute of limitations evidence, not the withdrawal defense. Since the court acknowledged that the latter was a close question and conviction was not certain, the prosecutor's improper remark, over objection, could not possibly be harmless error.

This Court should therefore grant certiorari to decide whether a defendant must make an additional showing of "substantial prejudice" where, in a close case turning on the credibility of prosecution witnesses, a prosecutor tells the jury in closing argument that the Government is too busy to prosecute innocent people, and the court overrules the defendant's objection.

CONCLUSION

The petition for a writ of certiorari should be granted.

Dated: New York, New York
February 10, 1992

Respectfully submitted,

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UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 102 – August Term 1991

(Argued September 30, 1991

Decided November 15, 1991)

Docket No. 91-1163

UNITED STATES OF AMERICA,

Appellee,

–v.–

WILLIAM LAMORTE, also known as "BUNKY",

Defendant-Appellant.

Before:

CARDAMONE, WALKER, and MCLAUGHLIN,

Circuit Judges.

Appeal from a judgment of conviction in the United States District Court for the Southern District of New York (David N. Edelstein, *Judge*) on the grounds, *inter alia*, that prosecutorial misconduct in summation denied appellant a fair trial and that the district court's jury instruction on withdrawal from conspiracy was improper.

Affirmed.

HERALD PRICE FAHRINGER (Diarmud White, Lipsitz, Green, Fahringer, Roll, Salisbury & Cambria, New York City) *for Appellant.*

MARTIN KLOTZ, Special Assistant U.S. Atty., New York City (Otto G. Obermaier, U.S. Atty., S.D.N.Y., Theodore E. Chervin and Samuel W. Seymour, Asst. U.S. Attys., New York City) *for Appellee.*

WALKER, *Circuit Judge:*

William "Bunky" LaMorte was convicted, following a jury trial, of one count of conspiring to import marijuana in violation of 21 U.S.C. § 846 (1988) and one count of engaging in a continuing criminal enterprise in violation of 21 U.S.C. § 848(a) (1988). District Judge David N. Edelstein sentenced LaMorte to 50 years imprisonment without parole and fined him $49,200,000. In a subsequent forfeiture proceeding, the defendant was ordered to surrender an additional $25,000,000 in cash and property. This appeal followed.

The Facts

At trial, the government asserted that William LaMorte headed a large and profitable marijuana importing organization that was responsible for bringing nearly 120 tons of the drug into the country since 1970. Several members of LaMorte's organization, including his brother Thomas, deck hands, off-loaders, boat captains, distributors, and suppliers testified for the government. Their

statements provided a detailed picture of LaMorte's global importing network.

Specifically, Thomas LaMorte and Steve Garrison, the captain of several boats used by William LaMorte to import marijuana, testified that between 1970 and 1977, LaMorte organized the importation of vast quantities of marijuana from Jamaica, Colombia, and Morocco. In some of these transactions, LaMorte, aboard his boat the *Mary Poppins*, personally ferried marijuana from an off-shore tanker to his Southold, New York estate. Thomas LaMorte also testified that in 1977, the defendant began operating on a new front, importing hashish from Lebanon.

By 1981, William LaMorte, apparently dissatisfied with the quality of the Lebanese drugs, launched a scheme to import boat loads of marijuana from Thailand. Leland Dart, Phillip Christensen, and John Corman, who helped organize and finance the Thai scheme, each provided substantial and consistent testimony regarding LaMorte's role. Christensen and Corman described a meeting they attended with LaMorte at Albert Ellis' house in Virginia in October, 1983, at which LaMorte produced a ledger detailing the different grades and prices of the Thai marijuana and complained that the marijuana was not selling well because it was moldy. The Thai scheme ended on April 9, 1985, when the United States Customs Service and the Coast Guard seized a fishing trawler, the *Oregon Beaver*, laden with 22 tons of Thai marijuana off the coast of San Francisco.

LaMorte presented two principal defenses. First, he argued that the governments' witnesses were incredible and intimated that the entire case against him had been

concocted. He pointed out that the testimony against him was purchased with reduced sentences, while he faced a long prison term. In his summation, LaMorte linked the prosecutor, by name, to this purported fabrication:

> Bill LaMorte sits in this courtroom because the government went out and called these people. They brought up Bill LaMorte's name, they suggested Bill LaMorte's name to these witnesses. These witnesses were not talking about Bill LaMorte until the government went to them and made deals with them to come in here and talk about Bill LaMorte. So don't let [the Assistant U.S. Attorney] disavow himself or distance himself from these witnesses, because that's exactly the way all of them walked into the courtroom.

In response to this allegation that the government had scripted the testimony against LaMorte, the government in its rebuttal summation made detailed reference to the evidence in the case. The government pointed out that witnesses who had not spoken in years corroborated important parts of each others stories. The government also noted that some inconsistencies in the witnesses' testimony remained and suggested that if the government was framing LaMorte, surely it would have done a better job. The attack on LaMorte's defense culminated with a series of rhetorical questions suggesting the inherent improbability of his claim:

> Ask yourself, why would these witnesses and why would the government seek to frame the defendant? You don't think the government is busy enough prosecuting crimes? You don't think the government is busy enough prosecuting crimes that it has the time to be prosecuting

> innocent people, going after people arbitrarily? I think I'll go after this guy today?

At this juncture, LaMorte objected to the government's suggestion that it did not prosecute innocent people. The court overruled the objection, the government moved on to other matters, and LaMorte did not request a curative instruction.

In some conflict with his theory that the government had created its case against him out of whole cloth, LaMorte's second defense was that if he had been in the drug smuggling business, he had withdrawn from the conspiracy by late September, 1984, so that the five year statute of limitations had run when the government filed its indictment on September 28, 1989. In support of this defense, LaMorte elicited from Leland Dart, one of his colleagues in the Thailand operation, that co-conspirator Albert Ellis told Dart in 1983 that LaMorte was "out of the business." Another conspirator, Phillip Christensen, testified that Ellis told him in July, 1984 that LaMorte didn't want to invest any more and wanted only to be paid back the investment he had made and that LaMorte was sick and wanted to retire from the business.

The government countered this defense with testimony that as late as December, 1984, Ellis assured Christensen and John Corman that LaMorte would be responsible for selling the Thai marijuana once it reached the United States. The government also presented evidence of a meeting in late 1984 or early 1985 between LaMorte and Stephen Garrison at which LaMorte assured Garrison that LaMorte was arranging a further shipment of marijuana from Thailand. This was the shipment that

Customs intercepted on April 9, 1985, and triggered the investigation leading to the indictment in this case.

The jury deliberated for six days without reaching a verdict, twice declaring itself deadlocked. On the seventh day, Judge Edelstein administered an *Allen* charge and shortly thereafter the jury returned a guilty verdict on both counts.

Discussion

LaMorte raises two principal objections on this appeal. First, LaMorte asserts that the prosecutor's suggestion that the government is too busy to prosecute innocent people so prejudiced his cause as to deny him a fair trial. Second, LaMorte claims that the district court's instruction on withdrawal from the conspiracy, coupled with the government's prejudicial argument in response to this defense in summation, denied LaMorte the opportunity to effectively present the defense.

1. Prosecutorial Misconduct

In evaluating whether allegedly improper comments by the prosecutor are grounds for reversal, the fundamental question is whether, if there was misconduct, it caused substantial prejudice to the defendant, thereby depriving him of his right to a fair trial. *United States v. Biasucci*, 786 F.2d 504, 514 (2d Cir.), *cert. denied*, 479 U.S. 827 (1986). This determination depends heavily on the context of the case, *United States v. Young*, 470 U.S. 1, 12 (1985); *United States v. Friedman*, 909 F.2d 705, 709 (2d Cir. 1990), and is largely controlled by three factors: (1) the

severity of the misconduct; (2) curative measures taken by the district court; and (3) the certainty of conviction absent the misconduct. *Id.*; *United States v. Modica*, 663 F.2d 1173, 1181 (2d Cir. 1981) (per curiam), *cert. denied*, 456 U.S. 989 (1982).

The prosecutor's statement that "[y]ou don't think the government is busy enough prosecuting crimes that it has the time to be prosecuting innocent people, going after people arbitrarily?" was improper. The principal reason that prosecutors must not make personal observations about the guilt of the defendant is that such an observation can create an inference in the mind of the jury that the prosecutor has knowledge of extra-record evidence proving that the defendant is, in fact, guilty. *United States v. Young*, 470 U.S. at 18. A prosecutor's assertion that the defendant is guilty also raises the risk that the jury will simply defer to the government's view of the evidence. *Id.* at 19.

Even though the prosecutor's statement was improper, reversal is not warranted here, despite the court's failure to sustain LaMorte's objection and give a curative instruction, since the misconduct was *de minimis* in the context of this case. *U.S. v. Nersesian*, 824 F.2d 1294, 1329 (2d Cir.), *cert. denied*, 467 U.S. 957 (1987). In this case, "[w]hen viewed in context, the prosecutor's remarks cannot be read as implying that the prosecutor had access to evidence outside the record." *Young*, 470 U.S. at 19. Rather, the statement, coming in direct response to LaMorte's suggestion that the prosecutor had induced witnesses to invent testimony against LaMorte, is best understood as ridiculing the notion that the government had arbitrarily constructed a massive case against him

out of thin air. Further, the overwhelming evidence of pre-statute of limitations criminality, to which the prosecutor's challenged remarks were addressed, "eliminates any lingering doubt that the prosecutor's remarks . . . exploited the Government's prestige in the eyes of the jury." *Id.* This is true notwithstanding our view that, because evidence on the separate withdrawal question was close, we cannot conclude that LaMorte's conviction was certain. Since there was virtually no likelihood that absent the questioned statement the jury would have accepted LaMorte's "fabrication" defense, we conclude that this prosecutorial excess did not deny LaMorte a fair trial.

2. Jury Instruction

LaMorte finds error in the district court's instruction on withdrawal. At the charge conference, the district court informed the parties that LaMorte had presented sufficient evidence to warrant charging the jury on the defense of abandonment and that the court intended to charge the jury as follows:

> A person can withdraw from a conspiracy by taking some affirmative steps to terminate or abandon his participation in, and efforts to promote, the conspiracy. In other words, the defendant must have taken some type of positive action to disavow or defeat the purpose of the conspiracy.
>
> For example, a defendant may withdraw from a conspiracy by giving timely warning to

> appropriate law enforcement officers or authorities; by making efforts to prevent the commission of the crime that is the object of the conspiracy; by wholly depriving his prior efforts or [sic – "of"?] effectiveness in the commission of the crime; or by doing acts which are inconsistent with the objective of the conspiracy and making reasonable efforts to communicate those acts to his co-conspirators.

LaMorte objected on the ground that only the last example was applicable to his defense and that adding the other examples would only confuse the jury. The court rejected this objection.

It is well settled that "a criminal defendant is entitled to have instructions presented relating to any theory of defense for which there is any foundation in the evidence, no matter how weak or incredible that evidence may be." *United States v. Durham*, 825 F.2d 716, 718-19 (2d Cir. 1987). Since there was some testimony from which it could be inferred that LaMorte withdrew from the conspiracy in 1984, LaMorte was, as the district court concluded, entitled to a jury instruction on withdrawal.

However, LaMorte is "not necessarily entitled to have the exact language of the charge [he] submitted to the district court read to the jury." *Id.* at 719; *United States v. Dyman*, 739 F.2d 762, 770-71 (2d Cir. 1984), *cert. denied*, 469 U.S. 1193 (1985). Rather, it is enough for the court's charge to indicate clearly to the jury the defendant's theory of the case and that the theory, if believed, justifies acquittal. *See United States v. Alfonso-Perez*, 535 F.2d 1362, 1365 (2d Cir. 1976). In short, the judge's charge must "adequately apprise[] the jury of the elements of the

crime charged and their defense." *Durham*, 825 F.2d at 719.

Here, we have no doubt that the district court's charge adequately informed the jury of defendant's theory of withdrawal. Indeed, the charge contained within it, as one of several alternative examples, the precise theory of withdrawal that defendant espoused, that he could withdraw "by doing acts which are inconsistent with the objective of the conspiracy and making reasonable efforts to communicate those acts to his co-conspirators." Further, the defense alerted the jury to this portion of the charge by stressing in summation that "the defense position is extremely simple. Mr. LaMorte quit participating, ended his participation in any illegal activities and he communicated that to his co-conspirators, that's it." Certainly, it is preferable for the district courts to avoid the possibility of confusion by not providing the jury with alternative examples incompatible with the defense theory. Nonetheless, the charge adequately apprised the jury of the defense theory, and we can not conclude that the charge was so confusing as to warrant reversal.

LaMorte argues further that the confusion resulting from deficiencies in the charge was exacerbated by the prosecutor's use in summation of the following analogy:

> Suppose you had a group of people who were going to blow up a plane maybe to collect the insurance money on somebody in it and they all got together and they built a time bomb and they set the bomb to go off twelve hours in the future or a day in the future or two days in the future or whatever and he then put the bomb on the plane and then the people who did it all left

> and went back to their houses and did whatever they were going to do.
>
> If the bomb goes off, as a defendant, you don't get to say "Hey, I'm not responsible, I wasn't there when the bomb went off."
>
> You don't get to say "I'm not responsible, I got second thoughts after we put the bomb on the plane."
>
> You establish the defense of withdrawal by doing something to diffuse the bomb; telling the authorities, going back and pulling the plug itself, doing whatever you have to do.

LaMorte responded in his summation by focusing precisely on the requirements for establishing the withdrawal defense:

> [T]he defense position is extremely simple. Mr. LaMorte quit participating, ended his participation in any illegal activities and he communicated that to his co-conspirators, that's it.
>
> And we suggest that that's enough to show disavowal of the purposes of the conspiracy with communication is enough to show withdrawal.

We agree that the prosecutor's use of the time bomb metaphor was, in the abstract, somewhat inflammatory and misleading. Nonetheless, "[t]he government is not barred from using rhetorical devices during the trial." *United States v. Biascucci*, 786 F.2d at 513. We conclude that, viewed in context, the statement did not prejudice LaMorte's cause.

LaMorte does not contend that the time bomb metaphor improperly suggested to the jury that LaMorte was

involved in uncharged violent crimes. Indeed, the government in summation expressly disclaimed any such inference. Rather, LaMorte argues that this metaphor confused the jury on the legal standard for withdrawal from a conspiracy. However, the government acknowledged in summation that "a defendant can announce to all the conspirators his lack of future participation and make certain that they all understand that he is no longer part of the conspiracy." Thus, far from portraying the "time bomb" example as the exclusive way to withdraw from a conspiracy, the government fully apprised the jury that if it accepted the defense's theory of the facts, then LaMorte was entitled to acquittal. While the government might have chosen a better metaphor, we can not conclude that the government's invocation of the time bomb analogy denied LaMorte a fair trial.

We have considered the remainder of LaMorte's objections and find them to be without merit. Accordingly, the decision of the district court is affirmed.